with which the law regards that class of defences, and partly to assimilate the practice at law and in equity. If rule 23 is to be obeyed, if the defendant intends to insist on the defence that though he undoubtedly entered into a contract, yet as that contract was not in writing, he does not intend to observe it; then he must clearly state his intention, or if he means to deny the legality of a contract he has entered into, he must say so in plain terms."

In terms thus stated, we doubt if the defendant could even at the trial be allowed to rely on the Statute. The practice of not allowing a fresh point of law to be argued on appeal has been strictly observed in England as well as here. In the "*Tasmania*"[2] Lord Herschell explained the practice, at page 225, in these words:

"My Lords, I think that a point such as this, not taken at the trial, and presented for the first time in the Court of Appeal ought to be most jealously scrutinised. The conduct of a cause at the trial is governed by, and the questions asked of the witnesses are directed to, the points then suggested. And it is obvious that no care is exercised in the elucidation of facts not material to them.

It appears to me that under these circumstances a Court of Appeal ought only to decide in favour of an appellant on a ground there put forward for the first time, if it be satisfied beyond doubt, first; that it has before it all the facts bearing upon the new contention, as completely as would have been the case if the controversy had arisen at the trial; and next, that no satisfactory explanation could have been offered by those whose conduct is impugned if an opportunity for explanation had been afforded them when in the witness box."

In the more recent case of *Rengasamy Pillay* v. *Comptroller of Income Tax*[3] Lord Diplock said on page 234 to the same effect thus:

"As has been repeatedly stated it is not the practice of their Lordships, save in very exceptional cases, to allow a fresh point of law to be argued without the benefit of the judgments in the court below, even where all the facts which may be relevant to the new point are before their Lordships and beyond dispute. (See *United Marketing Co.* v. *Kara* ([1963] 1 W.L.R. 523))."

As regards other grounds of appeal, we do not consider them material or relevant to the issue in this appeal and will not, therefore, consider them.

Finally, we wish to observe that the status of the appellant in these proceedings is in some doubt. We can find no evidence to suggest that he has legal authority to represent Madam Chong. The respondent raised this point in the court below but the point was not considered. It seems strange that before the application came before the court, neither Madam Chong, nor her son nor her husband had shown any interest in the land. The respondent presumably must have been paying the quit rent or otherwise the land would have been auctioned by the State for non-payment of rent.

We have no doubt whatsoever that this appeal must fail.

Azmi L.P. and **Ismail Khan C.J.** concurred.

Appeal dismissed.

Solicitors: *Ibrahim & Co.; Chong Bros.*

ZAINAB BINTI OTHMAN v. SUPERINTENDENT OF PRISONS, PULAU JEREJAK, PENANG

[O.C.J. (Chang Min Tat J.) August 14, 1973]
[Penang — Originating Motion No. 10 of 1973]

Habeas Corpus — Detention — Orders of Minister — Dates of two orders — Doubts not resolved — Emergency (Public Order and Prevention of Crime) Ordinance 5 of 1969, s. 4(1).

The question in this application for *habeas corpus* was whether the detainee was detained under a valid and effective order of the Minister. Counsel for the applicant alleged that there were two orders made by the Minister in exercise of his powers under section 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance, 1969, one dated 8 August 1973 and the other 6 August 1973. The order dated 8 August 1973 was never served on the detainee, and the respondent conceded that it was inoperative, but contended that the detainee was validly detained under the order dated 6 August 1973.

Held: *ex facie* there was some doubt whether the order of detention as served was the one actually intended to be made by the Minister and therefore an order would be made for a writ of *habeas corpus* to issue.

[**Editorial Note:** As to the question of costs herein see *Osman bin Mat Isa & Ors.* v. *Superintendent of Prisons, Alor Star & Anor.* [1974] 1 M.L.J. 189.]

ORIGINATING MOTION.

Karpal Singh for the applicant.

Abu Talib bin Othman (Legal Adviser, Penang) for the respondent.

Chang Min Tat J.: The question before me in this application by Motion for a Writ of *Habeas Corpus* to issue is, as contended by the learned Legal Adviser Penang, whether the detainee was presently detained under a valid and effective order of the Minister for Home Affairs.

It was alleged by Mr. Karpal Singh for the detainee, that there were two orders made by the Minister in exercise of his powers under section 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 5 of 1969, one dated 8 August and the other 6 August 1973. It would perhaps be more correct to say "bearing the date" and not "dated," as it would appear that the Minister signed the orders a fortnight or so earlier. The date expressed was factually the date of the commencement of the detention, but for convenience I shall continue to use the word, "dated".

The order dated 8 August was never served on the detainee and whatever its validity, the Legal Adviser conceded that it was inoperative. He however contended that the detainee was validly detained under the order dated 6 August which was served on him on the same day.

Inspection of the orders was offered to me and I was strongly urged to have a look at them. Only the order of 6 August was produced. It was impressed on me by Mr. Karpal Singh that the figure "6" was a superimposition over the figure "8" which had been erased. Having inspected the order, I am unable to say that Mr. Karpal Singh's contention is without foundation.

The question whether the Minister had made an order for the detention of the detainee from 6 August was therefore not answered with any certainty or reliability. An order is therefore made for a writ of *Habeas Corpus* to issue.

Order accordingly.

Solicitors: *Karpal Singh, Wong & Co.*

MAHESAN v. MALAYSIAN GOVERNMENT OFFICERS CO-OPERATIVE HOUSING SOCIETY LTD.

[F.C. (Azmi L.P., Suffian C.J. (Malaya) and Syed Othman J.) February 28, 1974]

[Kuala Lumpur — Federal Court Civil Appeal No. 70 of 1972]

Contract — Principal and Agent — Agent accepting bribe and inducing principal to enter into contract with person who has paid bribe — Agent causing loss to principal — Claim by principal to recover bribe and for loss or damage — Prevention of Corruption Act, s. 30 — Contracts (Malay States) Ordinance, 1950, s. 165.

Agency — Secret commission, bribe and compensation — Recovery by principal.

Co-operative Societies Ordinance, 1948 — Cooperative society a body corporate — Director agent of society — Liable to society for bribes or secret commissions and for loss or damage.

In this case the facts alleged against the appellant a director and secretary of the respondent co-operative society was that he knowing that the vendor of certain lands in Penang had purchased it for $456,000 failed to disclose to the society the transaction; that as a result the society purchased the land for $944,000; and that he after the purchase of the land without the knowledge and consent of the society received for himself the sum of $122,000 as a bribe or secret commission. The respondent society claimed compensation for loss or damage suffered by it and also the secret commission. The learned trial judge gave judgment on the claim for secret commission but dismissed the claim for compensation. The appellant appealed against the judgment on the secret commission and the respondent society cross-appealed against the dismissal of the claim for compensation.

Held, dismissing the appeal and allowing the cross-appeal:

(1) on the facts, the learned trial judge was justified in holding that the money received by the appellant was a secret commission from the vendor;

(2) the law is that where an agent who has been bribed to do so, induces his principal to enter into a contract with a person who has paid the bribe and the contract is disadvantageous to the principal, the principal may recover from the agent the amount of the bribe which he has received and therefore in this case the learned trial judge was right in holding that the respondent society was entitled to recover the secret commission received by the appellant;

(3) the authorities show that the principal is entitled to recover from the agent both the bribe and compensation for loss suffered by the principal and in this case as the facts showed that the loss suffered by the respondent society was the direct result of the appellant's misconduct or breach of duty, the respondent society was entitled to get compensation from the appellant.

Cases referred to:-

(1) *Tan Chow See* v. *Ratna Amnal* [1969] 2 M.L.J. 49.

(2) *Ferguson* v. *Wilson* (1866) L.R. 2 Ch. 77.

(3) *Aberdeen Railway Company* v. *Balikie Brothers* (1854) 1 Macqueen 461.

(4) *Mayor, Alderman and Burgesses of the Borough of Salford* v. *Lever* [1891] 1 Q.B. 168.

(5) *Hovenden and Sons* v. *Millhoff* 83 L.T.R. 41.

(6) *Maneklal* v. *Jwaladutt* A.I.R. 1947 Bombay 135.

(7) *N. Purkavastha* v. *Union of India* A.I.R. 1955 Assam 33.

(8) *Gambhirmull* v. *Indian Bank Ltd.* A.I.R. 1963 Calcutta 163.

(9) *Christoforides* v. *Terry* [1924] A.C. 566.

(10) *Grant* v. *Gold Explanation and Development Syndicate* [1900] 1 Q.B. 233.

(11) *Taylor* v. *United Africa Co. Ltd.* A.I.R. 1937 P.C. 10 and 78.

FEDERAL COURT.

V. C. George for the appellant.

Raja Abdul Aziz Addruse for the respondent in the appeal.

Peter Mooney for the respondent in the cross-appeal.

Syed Othman J.: The appellant was a director and secretary of the respondent society (the society). The allegations against him were that he knowing that the vendor, one Manickam, had purchased 59 acres of land in Penang for $456,000 failed to disclose to the society the transaction; that as a result, the society purchased the land in February, 1965 for $944,000; and that he after the purchase of the land without the knowledge and consent of the society received for himself from Manickam a commission totalling $122,000 made up of 2 payments: $82,000 on 13th May, 1965 and $40,000 on 29th June, 1965. The society claimed loss or damage *i.e.* $488,000 excess payment for the purchase of the land and $122,000 the secret commission.

The appellant in his defence denied knowledge that the land had been purchased for only $456,000 or that he had received for himself a commission of $122,000.

The learned trial judge, after a trial lasting 8 days, gave judgment on the claim for secret commission but dismissed the claim for compensation of $488,000.

The appellant appeals against the judgment on the secret commission and the society cross-appeals against the dismissal of the claim for compensation.

I think it is necessary to set out in some detail the two versions of the story in order to follow my grounds in the appeal and the cross-appeal.

The case of the society at the trial may be put briefly as follows. In 1964, a co-owner of the land gave one Rengasamy an option for sale of the land at $8,000 per acre. The total area of the land was 62 acres 0 rood 25 poles. In May, 1964 one Periasamy, since deceased, who was known to Rengasamy came to see him in Penang. He telephoned Manickam in Kuala Lumpur. Rengasamy also spoke to Manickam on the telephone and told Manickam that he had an option for $8,000 per acre but would not sell the land for less than $10,000. Periasamy returned to Kuala Lumpur on the same night. Manickam telephoned Rengasamy and told him that he would buy the land and that a Chinese would see the land and if he was satisfied another person would buy the land. A few days later the Chinese came to Penang with Periasamy and inspected the land for about one hour. That night Manickam spoke to Rengasamy on the telephone and